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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/605,001	06/27/2000	Gary Karlin Michelson	.101.0044-04000	5171

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MARTIN & FERRARO, LLP  
1557 LAKE O'PINES STREET, NE  
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EXAMINER
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BROWN, MICHAEL A

ART UNIT	PAPER NUMBER
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3772

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	01/17/2007	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

**Office Action Summary**

Application No.

09/605,001

Applicant(s)

MICHELSON, GARY KARLIN

Examiner

Michael Brown

Art Unit

3772

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 105-132 is/are pending in the application.
- 4a) Of the above claim(s) 130-132 is/are withdrawn from consideration.
- 5) ☒ Claim(s) 108-119, 121-124 and 127-129 is/are allowed.
- 6) ☒ Claim(s) 105-107, 120, 125 and 126 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_.

## DETAILED ACTION

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 105-107 and 120 are rejected under 35 U.S.C. 102(b) as being anticipated by Morrison '505.

Morrison '505 discloses in figures 1-5 a method for performing a surgical procedure comprising the steps of providing a surgical retractor including an elongated hollow member B, defining a longitudinal axis (fig. 1), the elongated member including proximal and distal end portions (fig. 1) and an opening (the opening between arms 11, fig. 2), the distal portion is configured for at least partially inserting at least partially into an intervertebral space (fig. 2) and has two space apart retractor arms 11, each arm including first and second supporting surfaces laterally displaced with respect to the longitudinal axis (fig. 2), distracting the adjacent vertebrae by at least partially inserting the retractor arms into the vertebral space (col. 2, lines 1-9), the supporting surface of one retractor arm engages one vertebrae (fig. 2), and the other support surface of the other retractor arm engages the other vertebrae (fig. 2), the adjacent opposed vertebrae are laterally displaced (fig. 2) performing a surgical procedure (inserting the graft C), introducing a surgical instrument 15 within the opening in the surgical retractor, the

Art Unit: 3772

surgical instrument being used to perform the surgical procedure (inserting the graft C) and introducing a fusion implant C through the opening in the surgical retractor (fig. 2).

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 125-126 are rejected under 35 U.S.C. 102(b) as being anticipated by Moskvovich.

Moskvovich discloses in figure 4 a method for performing a surgical procedure comprising providing a surgical retractor including an elongated hollow member (11, 12 and 13 make up the retractor), having proximal and distal end portions (fig. 4), the distal portion having first and second stationary retractor arms (11, 12 are stationary) configured for insertion at least partially into an intervertebral space defined between to opposed vertebrae (3, 4), distracting the adjacent vertebrae to a predetermined distraction position by at least partially inserting the retractor arms within the intervertebral space (to remove a damaged disc, col. 1, lines 20-24) performing the surgical procedure (inserting a bone graft 5) between the adjacent vertebrae and the retractor arms include first and second opposed supporting surfaces (fig. 4) that are inserted between the upper and lower vertebrae during the distraction step.

***Allowable Subject Matter***

Claims 108-119, 121-124 and 127-129 are allowed.

***Conclusion***

Art Unit: 3772

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael Brown whose telephone number is 571-272-4972. The examiner can normally be reached on 5:30 am-4:00 pm Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Patricia Bianco can be reached on 571-272-4940. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

M. Brown  
January 7, 2007



MICHAEL A. BROWN  
PRIMARY EXAMINER